76-1298

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA,
Respondent

v.

JAMES LEE WORTHINGTON,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, James Lee Worthington, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above case.

OPINIONS BELOW

Petitioner, James Lee Worthington, was indicted in cause number 74-V-2 in the United States District Court for the Southern District of Texas, Victoria Division, for possession with intent to distribute a controlled substance under Schedule I of the Controlled Substance Act of 1970, to-wit: approximately eight hundred forty-three

(843) pounds of marijuana, in violation of Title 21, U.S.C. Section 841(a)(1).

Petitioner entered a plea of "Not Guilty" and waived his right of a jury trial and was tried before the Court in Victoria, Texas. Petitioner's Motion to Suppress the marijuana was heard by the Court at the same time as the case on the merits. On September 12, 1975 the trial court issued its order denying Petitioner's Motion to Suppress and finding Petitioner guilty beyond a reasonable doubt of the crime charged by the indictment. A copy of that Memorandum and Order is printed as Appendix "A" to this petition.

After receiving sentence, Petitioner timely filed Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on January 10, 1977 and is as yet unpublished. A copy of that opinion is printed as Appendix "B" to this petition. The order of the Court of Appeals below denying Petitioner's Petition for Rehearing En Banc was entered on February 16, 1977, and is printed as Appendix "C" to this petition.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on January 10, 1977. Appellant's request for Rehearing En Banc was denied without opinion on February 16, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

At what point of time does a "Terry Stop" become an arrest?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Testimony during the course of this trial revealed that on April 27, 1974, Drug Enforcement Agency (D.E.A. hereinafter) Agent Gary Morrison received a telephone call from the Harlingen Airport operator named Anderwalt (R. 12).* Anderwalt told Morrison that a Cessna aircraft piloted by a young bearded man had landed at at Harlingen and that the light aircraft had the rear seats removed (R. 12). Shortly thereafter Agent Morrison received information from a confidential informant, who informed him that a bearded youngman in an unknown small airplane was meeting with other unknown persons at a green trailer house behind the Casa Blanca Motel and that this person was to leave Harlingen, Texas with a large quantity of marijuana (R. 13). The informant did not say that he had personal knowledge of these facts, or that he (the informer) personally observed the young man or the airplane, nor did the informer give Morrison any indication of how he had gained this information (R. 47-49).

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* References to the record of trial testimony shall be by the symbol "R".

Agent Morrison asked the informant to find out more information and report back (R. 13). Approximately two hours later, the informer reported that he had no further information (R. 15).

D.E.A. Agent Morrison never passed on the information he received from the informant to any Custom's officers who joined Morrison in surveillance of the aircraft and its pilot, Petitioner James Lee Worthington.

Custom's Agents from Corpus Christi and Houston began surveillance of Petitioner Worthington and his aircraft. During this surveillance a visual search of the aircraft on the ground at the Harlingen, Texas Airport and at Hooks Field, in Houston revealed that it contained cardboard boxes marked "Cessna Aircraft Parts" (R. 68; 163). Custom's Agents questioned Worthington about his presence in Harlingen and he explained that he was delivering Cessna Aircraft parts (R.167).

On April 28, 1974 a "beeper" type electronic tracking device was affixed to the tailcone of Petitioner's aircraft by Custom's pilots, for the purpose of assisting in the surveillance of the aircraft (R. 52-54). At about 8:30 A.M. Petitioner took off from the Harlingen Airport and was followed by a Custom's airplane. However, the Custom's pilots soon lost visual contact with the plane. The "beeper" device stopped transmitting and the agents claim no information was gained through the "beeper" (R. 54). Nevertheless, the custom's pilots were able, by monitoring radio communications, to ascertain that Worthington was headed for Hooks Airport in Houston and flew there and arrived a few minutes earlier than Worthington (R. 54).

The Custom's Agents observed the aircraft land, Worthington removed empty Cessna Aircraft parts boxes

from the airplane and replaced the rear seats (R. 56). Later in the day of April 28, 1974, Worthington flew the aircraft from Houston back to Harlingen. Worthington left the Harlingen Airport and proceeded to a trailer house behind the Casa Blanca Motel and the surveillance was discontinued. At approximately one hour later, Worthington reappeared at the Harlingen Airport and took off in his aircraft and proceeded to a McAllen Airport, followed by Custom's Agents in their aircraft.

From the McAllen Airport, Custom's Agents Bailey and Williams began to follow Petitioner Worthington in their aircraft until the point of Petitioner's arrest. Custom's Agents Bailey and Williams knew only that Petitioner and his aircraft were suspected of some sort of marijuana transporting activity and that at the point which their surveillance began no marijuana had been seen in the aircraft (R. 102). Custom's Agents Bailey and Williams followed Worthington's aircraft from McAllen to Harlingen where it landed and stayed on the ground for approximately fifteen (15) minutes. Then Worthington's aircraft flew to Mid-Valley Airport near Weslaco and landed and remained on the ground approximately fifteen (15) minutes. Worthington's aircraft then flew north from Mid-Valley Airport toward Victoria, Texas. Bailey and Williams kept the aircraft in sight at all times, but because of worsening weather conditions, called marginal or less than V.F.R., both aircrafts began losing altitude near Victoria, Texas. Worthington's aircraft then landed at Victoria, Texas.

As Petitioner's aircraft taxied to a stop on the taxiway in Victoria, Custom's Agents Bailey and Williams stopped and arrested Worthington and his aircraft and searched it. The arrest took place when Williams drew his .30

caliber carbine with special stock as Agent Bailey taxied the Custom's aircraft into such a position as to preclude Worthington from moving his aircraft and to throw the landing lights on Worthington's aircraft. As Agent Williams alighted from the Custom's aircraft, he pointed his .30 caliber automatic weapon at Worthington, ordering Worthington to halt his aircraft and place both of his hands out of the aircraft window, which Worthington immediately did (R. 95). As Williams approached Petitioner's aircraft, which Petitioner had halted and his hands were out of the window, Williams saw numerous large burlap sacks in the back of Petitioner's aircraft which he determined to contain marijuana.

During the trial to the Court, Petitioner moved the Court to suppress evidence of the marijuana seized as the fruits of an illegal, warrantless arrest in contravention of the Fourth and Fifth Amendments to the United States Constitution on the grounds that there was no probable cause for the arrest. The Court overruled the Motion to Suppress holding that there was probable cause and that even if there was insufficient facts to give the Custom's agents to arrest Worthington, there was at least sufficient facts to give the Custom's agents reasonable suspicion that Petitioner was involved in some illicit activity, thereby justifying a brief detention. The marijuana then became subject to seizure because it was within plain view of the Custom's agents as they approached Petitioner's aircraft. Petitioner was tried before the Court and found guilty (Appendix "A").

REASONS FOR GRANTING THE WRIT

Petitioner claims that the Drug Enforcement Administration agents illegally arrested and searched Petitioner's

airplane without probable cause or reasonable suspicion in violation of his Fourth and Fifth Amendment rights and that as a result of such illegal search and arrest the trial court erred in not granting Petitioner's Motion to Suppress the fruits of that search.

I.

Did The Custom's Agents Have Probable Cause To Justify A Warrantless Arrest Of Petitioner At The Airport In Victoria, Texas?

In determining whether the arrest of Petitioner Worthington, the search of his airplane and seizure of marijuana found therein was lawful, two primary questions arise:

1. At what point was Petitioner under arrest?
2. What facts did the arresting officers have personal knowledge of at the time of the arrest?

These two questions are determinative of the legality of Petitioner's arrest and therefore will be discussed separately.

Petitioner claims that he was under arrest from the time that the Custom's agents' airplane was maneuvered on the taxi way so as to block his aircraft from further movement and from the instant when Agent Williams began to alight from the Custom's aircraft with his .30 caliber weapon trained on Petitioner Worthington (R. 83-86; 95; 110).

Petitioner's position is based upon the clear wording of *Henry v. United States*, 361 U.S. 98 (1959), in which arrest is defined as that point in time when a defendant's

liberty of movement is restricted by the officers. In *Henry* the arresting officers *knew* that a crime had been committed and were in the same neighborhood as the crime investigating it when they saw Henry and Pierotti enter an automobile, drive to an alley and load boxes into an automobile. They had information concerning Pierotti implicating him with interstate shipments. They observed Henry and Pierotti repeat these actions and then arrested them and seized incriminating evidence. This Court held that the arrest of Henry and Pierotti was complete when the officers "interrupted the two men and restricted their liberty of movement." id. at 103. Thus at bar the arrest here was complete when the Custom's agents maneuvered their aircraft into a position so as to block Petitioner's aircraft, and when Agent Williams got out of his aircraft and aimed his weapon at Petitioner Worthington. As Agent Williams testified, it was only at this point, i.e. when Williams was sure that Worthington's aircraft was stopped, the engines shut down and Worthington's hands were out of the aircraft that Williams could, for the first time, clearly see the burlap sacks which contained outlines of brick like objects (R. 97). Williams, of course, concluded that the burlap sacks contained marijuana, but was unable to confirm this conclusion until a close up and thorough search of the sacks had been made (R. 98).

Without trying to be repetitive, the arrest was complete when Worthington's freedom of movement was restricted by the Custom's Agent. Therefore, the question resolves itself to, Whether the agents had probable cause to make that arrest?

If the Government should attempt to justify the stopping at gun point of Petitioner's aircraft as "stop and

frisk" as authorized by *Terry v Ohio*, 392 U.S. 1 (1968), and *Adams v. Williams*, 407 U.S. 143 (1972), they should be reminded that this Court restricted the right of "stop and frisk" in the Terry/Sibron/Peters/Adams, series of cases.[1] *Terry* held that in certain circumstances a limited intrusion into the right of privacy of an individual may be justified if the officer making the intrusion has within his knowledge specific and articulable facts which reasonably warrant this intrusion. But, as the Ninth Circuit Court of Appeals said in *U. S. v. Strickler*, 490 F.2d 378:

> "We simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands, with the 'brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information' which was authorized in [Adams v. Williams]."

Thus the scope of the intrusion into Worthington's right of privacy, to-wit: the blocking of his aircraft and ordering him to hold his hands out of the aircraft window at gun point, amount to a full blown arrest (R. 95-98).

II.

Was The Search Of The Airplane Piloted By Petitioner Tainted By His Illegal Arrest At The Airport In Victoria, Texas?

If the stop and arrest of Petitioner while piloting an aircraft was without probable cause, then any evidence

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1. *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968); *Peters v. New York*, 392 U.S. 40 (1968); *Adams v. Williams*, 407 U.S. 143 (1972).

obtained through the resulting search of the aircraft and the seizure of the marijuana found therein was unlawful and should be suppressed.

The facts and circumstances known to Agents Bailey and Williams at the time of the arrest were not such as to justify the arrest of Petitioner Worthington. Arresting Agents Bailey and Williams had only the following knowledge:

1. Drug Enforcement Administration Agent Morrison suspected Worthington and his aircraft of transporting marijuana from the Brownsville - McAllen area to Houston. Morrison had some confidential information, but did not share this information with Bailey and Williams nor did he tell Bailey and Williams how he had obtained this information.

2. Bailey and Williams observed Worthington's aircraft fly from McAllen, Texas to Harlingen, Texas then from Harlingen, Texas to Mid-Valley Airport at Weslasco, then from Mid-Valley Airport to Victoria, Texas, where the aircraft landed, apparently because of inclement weather.

These are all of the facts and circumstances known to the arresting officers at the time they determined to arrest Worthington and search his aircraft. Neither Agent observed any illegal activity nor had any contraband been seen before the arrest (R. 100); there was an apparent lawful reason for all of the acts which the Agents observed Worthington committing and each act is in itself altogether consistent with an innocent construction. The arresting officers had no knowledge that any specific crime had been committed. In fact, the officers had partially confirmed Worthington's explanation of his visit to

the McAllen-Brownsville area, that is, the officers had seen boxes containing markings "Cessna Aircraft Parts" in the airplane (R. 57; 68-69; 163), Further, a visual search of the airplane at the airport in McAllen and in Houston revealed no contraband (R. 34; 36; 37; 162-163). The informer's tip was insufficient to supply probable cause to D.E.A. Agent Morrison and certainly could not give the arresting agents any right to arrest since the information was never passed on to the arresting Custom's Officers Bailey and Williams (R. 100-103).

Again referring to *Henry v. United States*, there the arresting officers knew that a specific crime had been committed. Yet there the "outwardly innocent" activity was held inadequate to establish probable cause. In the case at bar the arresting officers did not even know whether a crime had been committed.

Draper v. United States, 358 U.S. 307 (1959), adds little support to the Government's position. In *Draper*, specific and detailed information from a known informant of established reliability confirmed every particular of the officers' own observations before the arrest. In the case before this Court, the informer's information was general: "a youngman in his twenties, with a beard has just arrived in Harlingen, Texas, and was to leave the Harlingen, Texas area in a small aircraft, logs and type unknown, with a large quantity of marijuana" (R. 13). The informer did not know whether the marijuana was already in the aircraft, was to be brought in from Mexico, was to be purchased by the young man, when the young man was to leave, or any other details except that the young man was meeting other unknown in a trailer house behind the Casa Blanca Motel (R. 13; 47-49). When asked by Agent Morrison to provide additional informa-

tion, the informant two hours later said that he could discover no further information (R. 14; 49). Furthermore, and even more important, the information from the informer was possessed and known only to D.E.A. Agent Morrison, who did not pass it on to the arresting officers.

The insufficiency of the informer's tip is clear under the *Aguilar/Spinelli* formula[2] In *Aguilar* there was no demonstration of the source of the tip or its reliability. Here, the informer was an untested informant. In *Spinelli* this Court held there must be facts showing why the informant is reliable and the basis of the informer's knowledge. In the case at bar there was no showing of reliability or the basis of the informant's knowledge.

In short, clearly established law says that whether a warrantless search is constitutionally valid:

> "Depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they have reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Therefore, at the time the arresting officers, Customs Agents Bailey and Williams, stopped and arrested Petitioner and his airplane at gun point, they did not have within their knowledge sufficient facts and circumstances which would justify them in doing so. That an armed approach to Petitioner was an arrest and that such armed

2. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

approach occurred before the Customs Agents discovered marijuana in the aircraft. That the arrest was unlawful and therefore the search of the aircraft and the subsequent seizure of the marijuana therein was unlawful and should be suppressed.

Judge Goldberg's dissenting opinion set out in Appendix "B" is the essence of Petitioner's claim of an illegal arrest:

> "Each particular type of seizure, however, requires under *Terry* a careful weighing of governmental and individual interest. *Terry* neither diluted one whit the probable cause requirement for an arrest nor said that every seizure less oppressive than an arrest is permissible upon less than probable cause. The opinion simply set forth the balancing principle and found that it allowed for the limited, though significant, intrusion of a weapons pat-down in the situation presented."

Judge Goldberg's dissent contains an indepth analysis of the leading cases wherein the circuit courts and this Court has discussed the nature of the *Terry* confrontations. In his opinion the facts at bar are beyond the scope of the ordinary *Terry* stop:

> "The concatenation of two dramatic acts—the blockading of the plane and the leveling of the rifle—takes this case far beyond an ordinary request to stop and answer questions, even a request directed to a moving vehicle. The sight of flashing red lights in the rear view mirror may be unwelcome and may bring on sinking sensations in the pit of the motorist's stomach. I cannot conceive that the intrusion compares to that which besets the individual target of the type of accosting involved here. I would con-

> sequently deem the seizure of Worthington an arrest. To do otherwise places a judicial imprimatur on ever increasing intrusions into individual privacy, in ever increasing derogation of the fourth amendment's protective promise to the citizens of our land."

Judge Goldberg did not take issue with the marjority's Statement of Facts or their assessment of the legitimation of an investigative stop.

> "I concur in the majority's assessment that the circumstances prior to the confrontation had created the reasonable suspicion required under the investigative stop cases, and I agree that the 'brick outline' sighted during the confrontation gave rise to probable cause in the total complex of circumstances presented. I cannot, however, accept the characterization of that initial confrontation as an investigative stop. I simply connot persuade myself that Worthington, completely stymied and faced with the barrel of a rifle held by an agent of the law, was under anything less onerous than an arrest. To put the matter bluntly, Worthington was not stopped, he was not frisked, he was simply arrested, before probable cause existed."

CONCLUSION

Petitioner respectfully concludes to this Court that the Custom's Agents, in making their arrest of Petitioner at the airport in Victoria, Texas were acting without probable cause; that the search and seizure of the marijuana was therefore illegal and should be suppressed.

For the reasons stated above the conviction should be reversed and the cause remanded to the trial court with

directions to dismiss the indictment or to reverse the trial court's denial of Petitioner's Motion to Suppress and thereupon render judgment of acquittal for Petitioner.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petition for Writ of Certiorari were mailed to Mr. Edward McDonough, United States Attorney, attorney for Respondent, Federal Building, 515 Rusk, Houston, Texas, on the _____ day of March, 1977, by depositing same in the United States Mail properly stamped and addressed.

_____
C. ANTHONY FRILOUX, JR.

"EXHIBIT A"

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

CR. NO. 74-V-2

UNITED STATES OF AMERICA

v.

JAMES LEE WORTHINGTON

ORDER

The trial of this case was commenced on May 2, 1975, The indictment against this Defendant, James Lee Worthington, was returned in the Victoria Division, and, with the Defendant's agreement and his waiver of jury trial, was tried before this Court in Corpus Christi, Texas. The motion to suppress the contraband (marijuana) was heard at the same time as the case on the merits. The Court will now discuss its findings of fact in narrative form and, due to the several successive material incidents here involved, will set forth its pertinent conclusions of law in connection with such incidents.

The first thing that happened in the order of events occurred about 6:30 p.m. on April 27, 1974, at the Harlingen, Texas, airport. Customs' Patrol Officer Vera, in uniform, was standing on the ground near the base of the tower at the airport and near a distinctively marked Customs' aircraft. He watched a plane land and taxi along toward a hanger near where Vera was standing. He thought the two occupants evidenced an unusual amount of interest in him and in his aircraft. Two individuals,

one with a beard, left the aircraft and walked into the hangar. Vera noticed the rear seats were not in the plane and Cessna-parts boxes were in their place. The bearded young man shortly thereafter peered out of the hangar at Vera and later went to him and explained that the rear seats had been removed and empty Cessna-parts boxes were in the aircraft because he and his companion were hauling aircraft parts. Vera, a Customs officer, considered this activity on the part of the bearded youth as being of a suspicious nature. Subsequently, these two individuals left the airport by automobile.

The activities above described were observed by a man named Anderwald, who is the owner of an aircraft business at the Harlingen airport. He, too, thought the circumstances were suspicious and he suggested to Vera that he contact the Drug Enforcement Agency, but Vera would not do so. Thereafter, Anderwald called Gary Morrison, a Drug Enforcement Agent. This call was made sometime that same evening before 8:00 p.m. This was the way Morrison first heard that a plane with the rear seat removed and piloted by a young man with a full beard had landed at the Harlingen airport.

Shortly after having received the telephone message from Anderwald, Morrison received another telephone call, this time from a person whom he testified had previously been a reliable confidential informant. This informant told him that a bearded young man in his 20's was to leave the Harlingen airport in a plane with a large quantity of marijuana. The exact date and time was not mentioned. At this point, Morrison had enough information to certainly create a reasonable suspicion that a marijuana transaction was about to commence. During this conversation, the informant said that the bearded youth

was meeting with other persons, identity unknown, in a green trailerhouse behind the Casa Blanca Motel in Harlingen, Texas.

Subsequently, Morrison and Vera again talked with each other and Morrison, without relaying to him the information received from the informant, told Vera the aircraft piloted by the bearded youth was under investigation, but not exactly why.

Thereafter, Morrison called Hooks Airport in Houston and, after determining the aircraft owner's name, found out the aircraft had been leased to a James Worthington. In addition, Morrison verified the location of a green trailerhouse behind the motel. Subsequently, the informant contacted Morrison and told him there was no further information. Nevertheless, Vera and Morrison continued surveillance of the Worthington aircraft and in the early hours of the next day, April 28th, Customs pilots Ruehl and Halfacre joined the surveillance. A "beeper" type device was affixed to the tailcone of the Worthington aircraft by Customs' pilots, for the purpose of assisting in the surveillance of the aircraft.

Later, at about 8:30 a.m., Defendant Worthington arrived at the airport with another man. When this occurred, the two Customs' pilots took their aircraft into the air and from there observed Worthington take off from the Harlingen airport, but soon lost visual contact with the plane. The "beeper" device stopped transmitting and no information was gained through the "beeper." Even so, the Customs' pilots, by monitoring radio communications, were able to ascertain that the Worthington aircraft was requesting weather information which indicated it was headed for Houston. Knowing already the aircraft

was based at Hooks Airport in Houston, the Customs' pilots flew there and arrived a few minutes earlier than Worthington.

The Customs pilots watched, from the ground, Worthington unload the boxes from the craft and reinstall the seats and returned the aircraft to Sea-Back Aviation. Ruehl examined the boxes and apparently they were empty Cessna aircraft-part boxes. While at Hooks Airport, Agent Ruehl was advised by DEA Agent Atkins, based in Houston, that Worthington was suspected of dealing in narcotics.

Later, on the same date, Agents Ruehl and Halfacre, observing Worthington and another person arrive at the Hooks Airport, took off in their plane in order to continue surveillance. Agent Atkins, still on the ground, advised Ruehl and Halfacre that Worthington had removed the rear seats of the aircraft and was taking off. Ruehl and Halfacre, keeping visual contact, followed Worthington to Harlingen. By this time, Customs' pilots Bailey and Williams had joined surveillance.

Agent Morrison was at the airport in Harlingen when Worthington landed and saw him and another person leave the airport in a Mercury Capri. Morrison followed. Worthington went directly to the green mobile home at the rear of the Casa Blanca Motel. After having obtained this information, Morrison returned to the airport and the Customs' pilots on surveillance, and Morrison discussed the information then available.

Later, about 8:30 p.m., the Customs' agents saw Worthington take off in his craft and they followed, maintaining visual contact. Worthington landed and refueled at Brownsville, and from there to Mid-Valley Air-

port where it landed about 10:00 p.m. The Worthington plane was on the ground there 15-20 minutes. Bailey and Williams, now the only officers on surveillance, circled that airport but didn't see anything loaded onto the Worthington aircraft. Obviously, Bailey and Williams knew they were involved in surveillance on a marijuana case. But, how much detailed information they were aware of is uncertain. But, they were on the ground with Ruehl and Halfacre and also with Morrison, so it is reasonable to assume they were well aware of the reason for the surveillance.

At about 10:30 p.m., Worthington left Mid-Valley Airport, heading north, and Bailey and Williams continued surveillance. The weather deteriorated rapidly but Bailey and Williams kept in visual contact. Worthington landed in Victoria and immediately afterward Bailey and Williams landed and taxied their plane to where Worthington had stopped, and, in front of Defendant's aircraft. The landing lights were on and gave adequate illumination of the area. Bailey was in charge and Williams was taking instructions. As Williams got out of Customs' aircraft with a gun and flashlight, he could see the Defendant and the gunnysacks in the plane. As the officer approached, he could see the outline of bricks in the sacks. At some point after Williams had gotten out of the Customs' plane, he told Worthington to put up his hands, that he was under arrest. The Court is satisfied this took place after Williams saw the sacks in the plane.

The Court finds that under the facts as presented to the Court, the Fourth Amendment rights of the Defendant were not violated and therefore the marijuana seized at the time of the Defendant's arrest ought not be sup-

pressed. The Court believes that this finding is supportable under either of two theories. First, the Court is of the opinion that when the Defendant's plane landed on that stormy night in Victoria there existed probable cause for the arrest (and search) of this Defendant. Second, the Court is also of the opinion that even if there was insufficient probable cause to arrest the Defendant, the arresting officers were justified in momentarily detaining the Defendant. The marijuana then became subject to seizure because it was within the plain view of the officers as they approached the plane.

It is axiomatic that the existence of probable cause for arrest depends on whether there were sufficient facts and circumstances to lead a reasonable and prudent man to believe that an offense had been committed by the arrestee. *Brinegar v. United States,* 338 U.S. 160, 175 (1949); *Adams v. Williams,* 407 U.S. 143, 149 (1972)). Knowledge of every fact and circumstance constituting probable cause by the individual arresting officer is not, as the Defendant claims, an absolute requirement. Rather, probable cause can rest, as the Court finds in this case, on collective knowledge of the government when there is some degree of communication between the arresting officers and those officers possessing the information upon which probable cause might be based. *United States v. Nieto,* 510 F.2d 1118, 1120 (5th Cir. 1975).

Probable cause can be based on an informant's tip if there is subsequent corroboration of the details of the tip to insure its reliability. *Draper v. United States,* 358 U.S. 307 (1959). Agent Morrison received a tip from an informant whom he testified was a reliable one. This informant's tip was sketchy, but it was sufficient to put the agent on the alert for someone fitting a certain description who was supposed to be departing the Harlington airport with a large quantity of marijuana. The tip also tied this bearded youth to a green trailerhouse behind the Casa Blanca Motel in Harlingen, Texas. The accuracy of this tip was confirmed by Agent Morrison's personal surveillance of the Defendant who fit the description given by the informant and who had been reported, quite independently of the informant's tip, to have been acting in a very suspicious manner by Mr. Anderwald, owner of an aircraft business at the airport. The Defendant, just as the informant said, visited this green trailerhouse.

In addition to the agent's corroboration of the informant's tip, there were other circumstances, strange and erratic activities on the part of the Defendant, which tended to show that this Defendant was not dealing in aircraft parts, as he had told Officer Vera. These other circumstances, which were certainly also on the minds of the government agents, can be considered by the Court in evaluating whether probable cause existed. *United States v. Horton,* 488 F.2d 374, 379 (5th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); *United States v. Sequella-Avendondo,* 447 F.2d 575, 583 (5th Cir.), *cert. denied,* 404 U.S. 985 (1971). Traveling in the late afternoon and night, the Defendant literally airport-hopped around South Texas, staying in most places only a short period of time. He flew from Hooks Airport in Houston to Harlingen, from Harlingen to Brownsville where he fueled his plane, from Brownsville to Mid-Valley Airport, which is unmanned at night, and then proceeded back north only to be forced by the weather to land in Victoria.

The Court believes the informant's tip, corroborated by the agent's observations, and the Defendant's erratic behavior gave the government probable cause for his ar-

rest when the plane landed in Victoria. The probable cause which would support the Defendant's arrest would also support a search of the plane.

The Court further believes that even if there were insufficient facts to give the government agents probable cause to make an arrest, there were at least sufficient facts to give the government agents reasonable suspicion that the Defendant was involved in some illicit activity, thereby justifying a brief detention of the Defendant. The obvious presence of the marijuana in the plane conferred then on them sufficient probable cause for the arrest. The Supreme Court has held that an informant's tip will justify the brief stop of a suspicious individual to obtain his identity or to maintain the status quo momentarily while obtaining more information. *Adams v. Williams,* 407 U.S. 143, 145-6 (1972). In this case, there was more than just the informant's tip to raise their suspicion and to cause them to stop the Defendant. The manner of the stop was justified. The agents, knowledgeable in the ways of the narcotics traffic, had reason to fear for their lives as they jumped from their plane in a dark, unpopulated area of the airstrip. Due to this threat, the immediate display of weapons should not be considered, as the Defendant would contend, a traditional or full custody arrest. To use the words of the Supreme Court in *Terry v. Ohio,* 392 U.S. 1 (1968), the agents "seized" the Defendant and his plane that night in Victoria, and for purposes of the Fourth Amendment the Court finds that "seizure" was "reasonable." *Id.*, at 16.

The Defendant's motion to suppress is denied.

The Court finds, in light of the evidence, that the Defendant is guilty beyond a reasonable doubt of the crime charged by indictment.

The Defenadnt shall present himself before the Court for sentencing on the 14th day of October, 1975, at 1:30 o'clock p.m., in Victoria, Texas.

IT IS SO ORDERED.

SIGNED this 12th day of September, 1975.

Owen D. Cox

United States District Judge

"EXHIBIT B"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES LEE WORTHINGTON,
Defendant-Appellant.

NO. 76-1586.

United States Court of Appeals,
Fifth Circuit.

January 10, 1977.

Defendant was convicted in the United States District Court for the Southern District of Texas, Owen D. Cox, J., of possessing approximately 843 pounds of marijuana with intent to distribute, and he appealed. The Court of Appeals, Simpson, Circuit Judge, held that specific, articulable facts within the knowledge of customs agents were sufficient to create a reasonable suspicion that defendant was engaged in criminal activity and to justify an investigatory stop of defendant; that, as soon as the investigatory stop was made, the agents had probable cause by visual observation to believe that defendant's aircraft contained contraband and, therefore, the warrantless arrest of defendant and subsequent search of the airplane were lawful; and that, under the circumstances, no error resulted from the district court's failure to conduct an in camera interview with a confidential informer.

Judgment affirmed.

Goldberg, Circuit Judge, dissented and filed opinion.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, SIMPSON and GEE, Circuit Judges.

SIMPSON, Circuit Judge:

James Lee Worthington was charged in a one count indictment with possessing approximately 843 pounds of marijuana with intent to distribute, in violation of Title 21, U.S.C., Section 841(a)(1). He plead not guilty, and was found guilty as charged by the district court in a bench trial, after waiving a jury. The hearing on Worthington's motion to suppress the evidence as to his warrantless arrest and the search of his aircraft was conducted simultaneously with the trial on the merits. The basis for appellant's conviction was the court's finding that probable cause existed for the arrest and search. This appeal is from the judgment of conviction and Worthington's sentence to 3 years confinement to be followed by a special parole term of 3 years.

The appellant's primary contention is that the district court erroneously denied his motion to suppress the seized marijuana as the fruit of an illegal arrest and search. He asserts further that the court should have conducted an *in camera* interview with the confidential informer so as to determine whether to permit disclosure of the informer's identity and access to him as a witness. We find these contentions to be lacking in merit and affirm the conviction.

The following recitation of uncontested facts is distilled from the transcript of the hearing, in combination with the fact findings of the trial judge. The two versions differ slightly in immaterial particulars. On April 27, 1974, federal Drug Enforcement Administration (DEA) Agent Gary Morrison, received a telephone call from a Mr. Anderwald, the owner of Air Central[1] at the Harlingen Airport located near Harlingen, Texas in the lower Rio Grande Valley.[2] Mr. Anderwald told Agent Morrison that a Cessna aircraft with its rear seats removed had just arrived, piloted by a bearded young man. Agent Morrison testified at trial that the aircraft described by Anderwald is the type commonly used to transport contraband. Shortly thereafter, Agent Morrison received a call from a person who had previously furnished him with reliable information. This informer told Agent Morrison that a bearded young man had just arrived in Harlingen and would leave in a small aircraft with a large amount of marijuana. He also reported that this young man was meeting with other persons at a green mobile home behind the Casa Blanca Motel in Harlingen. No further information was obtained from the informer. Agent Morrison verified the location of the green trailer. He also learned that the Cessna aircraft had been recently leased to a James Worthington.

A Customs officer, who had observed the aircraft land, noted that it contained boxes marked "Cessna Aircraft Parts" in place of the rear seats. He and Agent Morrison kept the airplane under surveillance and were soon joined by two Customs agents. In the early morning hours of April 28, 1974, an electronic tracking device ("beeper")

1. Not further identified in the record.

2. Harlingen is approximately ten miles from the Mexican border.

was placed on Worthington's aircraft by the Customs agents to assist in the surveillance. Later that morning the agents saw appellant Worthington arrive at the airport in a Mercury Capri with another man. The Customs agents then took off in their aircraft. From the air, they observed appellant take off. Visual contact with his plane was soon lost. A few minutes later the "beeper" stopped transmitting information and did not function thereafter. But by monitoring radio communications, the Customs agents were able to determine that appellant's aircraft was headed for Hooks Airport in Houston. When they arrived there, they saw appellant unload the boxes and replace the rear seats. The agents later examined the boxes and found them empty. A DEA agent based in Houston told one of the Customs agents at Hooks Airport that appellant was suspected of drug dealing in the Houston area.

Later that same day, Worthington returned to the airport, again removed the rear seats, and took off in the aircraft. The Customs agents, maintaining visual contact, followed appellant to Harlingen Municipal Airport, from where he went to the green trailer behind the Casa Blanca Motel. The Customs agents followed Worthington when he took off again from Harlingen about 8:30 that night. He landed and refueled at Brownsville, Texas, and then flew back to Harlingen. The aircraft remained on the ground for approximately fifteen minutes, then took off and flew to Mid-Valley Airport, Weslaco, Texas. It remained there for another fifteen minutes before leaving. Due to bad weather conditions, both planes landed at Victoria, Texas, around midnight. The Customs plane taxied in front of appellant's aircraft which had already stopped. One of the agents got out of

the Customs plane with a flashlight and his gun in hand. He could see burlap sacks, containing brick-like objects, "piled about" appellant. The agent testified that, in light of his experience, the sacks appeared to contain marijuana. He then told appellant to raise his hands and remain seated in his aircraft. The other Customs agent searched appellant for weapons. Appellant was advised of his *Miranda* rights at this time. He and his aircraft were flown to Corpus Christi and placed in the custody of a DEA agent.

Appellant's chief contention is that his warrantless arrest was illegal due to an absence of probable cause, and thus any evidence derived from the arrest and the ensuing search should have been suppressed as seized in violation of his Fourth Amendment rights. He places the time of arrest at the moment Customs agent Williams taxied his plane in front of appellant's aircraft and disembarked with a flashlight and a gun. The district court found that the government had sufficient probable cause to arrest based on the informer's tip corroborated by the agents' observations and appellant's erratic behavior. The court concluded in the alternative that even if the facts then known were insufficient to provide probable cause for arrest, sufficient facts were present to justify brief detention of appellant for investigation. Cf. *Terry v. Ohio*, 1968, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-79, 20 L.Ed.2d 889, 903-05. Appellant's contention regarding the time of his arrest was specifically rejected by the district court, which fixed the time of arrest as after the brief detention and the sighting of the burlap sacks in plain view: "The obvious presence of the marijuana in the plane conferred then on them sufficient probable cause for arrest." The court elaborated: "At some point

after Williams had gotten out of the plane, he told Worthington to put up his hands, that he was under arrest. The Court is satisfied this took place after Williams saw the sacks in the plane."

[1] Time of arrest is a question of fact which depends upon an evaluation of the testimony of those who were present at the time. *Rios v. United States*, 1960, 364 U.S. 253, 262, 80 S.Ct. 1431, 1436-37, 4 L.Ed.2d 1688, 1694. The conclusion of the district court is supported by the record. We therefore hold that appellant was "seized" in a reasonable manner in light of the surrounding exigent circumstances. *Terry v. Ohio*, supra.

[2, 3] The facts in this case, as they were known to the Customs agents at the time, provided ample justification for appellant's stop and subsequent arrest. It is true that an informer's tip is no adequate grounds for an arrest or search absent verified, consistent reliability of the informer, an indication of how the informer came by his information, or details of the alleged criminal activities. *Spinelli v. United States*, 1969, 393 U.S. 410, 416, 89 S.Ct. 584, 589, 21 L.Ed.2d 637, 643-44; *United States v. Freund*, 5 Cir. 1976, 525 F.2d 873, 875-76, cert. denied ____ U.S. ____, 96 S.Ct. 2631, 49 L.Ed.2d 377; *Bailey v. United States*, 5 Cir. 1967, 386 F.2d 1, 3, cert. denied 1968, 392 U.S. 946, 88 S.Ct. 2300, 20 L.Ed.2d 1408. However, if independent investigation by government agents yields information consistent with and corroborative of the informer's tip, the wararntless arrest is legal. *Draper v. United States*, 1959, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327; *United States v. Freund, supra*, 525 F.2d at 875-76; *United States v. Anderson*, 5 Cir. 1974, 500 F.2d 1311, 1316; *United States v. Summerville*, 5 Cir.

1973, 477 F.2d 393, 395; *United States v. Squella- Avendano,* 5 Cir. 1971, 447 F.2d 575, 581, cert. denied 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.2d 369. Here, one of the government agents had received a tip from an informer. While the tip was lacking in detail, its accuracy and reliability were corroborated by the subsequent surveillance of appellant Worthington's acivities.

[4, 5] Moreover, we view the rapid airport hopping and the transporting of empty boxes, when added to the tip as grounds for reasonable suspicion by the agent that appellant was involved in criminal activity. See *United States v. Robinson,* 5 Cir. 1976, 535 F.2d 881; *United States v. Maslanka,* 5 Cir. 1974, 501 F.2d 208, cert. denied *sub nom. Knight v. United States,* 1975, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777; *United States v. McCann,* 5 Cir. 1972, 465 F.2d 147, cert. denied *sub nom. Kelly v. United States,* 1973, 412 U.S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 154. At a minimum the Customs and DEA agents were justified in stopping appellant to investigate further. "[T]he courts have recognized the right of police officers to stop and detain an individual . . . with less than probable cause." (Citations omitted). *United States v. Robinson, supra,* 5 Cir. 1976, 535 F.2d 881, 883. It is the legitimate function of law enforcement agents to detect and prevent crime. See *United States v. McCann, supra,* 465 F.2d at 157-58. It is their duty to be alert for suspicious activities and to follow up with appropriate investigation within constitutional limits. *United States v. Allen,* 5 Cir. 1973, 472 F.2d 145, 147. The agent's observations must lead him "reasonably to conclude in light of his experience that criminal activity may be afoot . . ." *Terry v. Ohio,* 1968, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889, 911.

[6, 7] There was no legitimate, logical explanation for appellant's behavior. The specific, articulable facts within the agents' knowledge, from the informer's tip to appellant's erratic flight schedule, together with the rational inferences drawn therefrom were sufficient to create a reasonable suspicion that criminal activity was in progress. See *Terry v. Ohio, supra,* 392 U.S. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906; *United States v. Rias,* 5 Cir. 1975, 524 F.2d 118; *United States v. McCann, supra,* 465 F.2d 147. There was much more here than merely an "inchoate and unparticularized suspicion or 'hunch' . . ." *Terry v. Ohio, supra,* 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. We therefore find that the investigatory stop at the Victoria, Texas airport was warranted for the purpose of investigation.[3]

[8-10] As soon as the investigatory stop was made, and the flashlight beam was directed into the plane, the agents had probable cause from visual observation to believe that the plane contained contraband. Gunnysacks containing brick-like objects were revealed. Williams testified that, from his experience he was familiar with such packages, and thus knew they often contained kilo bricks of marijuana. We find no error in the court's finding that

3. We agree with the trial court and reject appellant's contention that a full-blown arrest occurred at the precise moment that the Customs plane was positioned in front of appellant's plane, and Customs agent Williams emerged with gun and flashlight in hand. We hold that the stop was made in an acceptable manner under the circumstances present. Blocking the plane was a reasonable manner in which to effect the stop and maintain the *status quo.* An investigatory stop is not automatically an arrest simply because an officer draws his gun. See *United States v. Maslanka, supra,* 501 F.2d at 213, n. 10. From following appellant during his inexplicable flights, and based upon their experience with drug traffickers, the agents reasonably feared death or serious injury when they stopped and approached appellant's plane on the dark, deserted airstrip. Carrying a drawn gun was reasonable under the circumstances.

it was at this time that he advised appellant of his rights and arrested him. Probable cause is present at the instant the facts and circumstances known to the arresting officer warrant belief by a prudent person that a crime has been or is being committed. *Adams v. Williams,* 1972, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612; *Dyke v. Taylor Implement Mfg. Co., Inc.,* 1968, 391 U.S. 216 88 S.Ct. 1472, 20 L.Ed.2d 538; *Beck v. Ohio,* 1964, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142; *Draper v. United States,* 1959, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327; *Brinegar v. United States,* 1949, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *Williams v. United States,* 5 Cir. 1968, 404 F.2d 493. Moreover, the exigent circumstances necessary to justify a warrantless arrest were present here, in view of the "mobility of the [vehicle], the possibility of flight, and subsequent destruction of evidence . . ." *United States v. Troise,* 5 Cir. 1973, 483 F.2d 615, 617, cert. denied 414 U.S. 1066, 94 S.Ct. 574, 38 L.Ed.2d 471. *See Carroll v. United States,* 1925, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; *United States v. Church,* 9 Cir. 1973, 490 F.2d 353, 355, cert. denied 1974, 416 U.S. 983, 94 S.Ct. 2385, 40 L.Ed.2d 760.

[11, 12] Observation of the burlap sacks containing brick-shaped objects in plain view justified the arrest and subsequent search. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." (Citations omitted). *Harris v. United States,* 1968, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067, 1069.[4] Discovery of such evidence was not the result of a search. *Marshall v.*

4. Under the plain view doctrine the officers must discover the evidence by inadvertence and while they have a legitimate reason for being present. *Coolidge v. New Hampshire,* 1971, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. However, the fact that the agents expected to find marijuana does not destroy the necessary inadvertence. *See United States v. Cushnie,* 5 Cir. 1973, 488 F.2d 81, 82, cert. denied 1974, 419 U.S. 968, 95 S.Ct. 233, 42 L.Ed.2d 184.

United States, 5 Cir. 1970, 422 F.2d 185, 188-89. The stop and search were legitimately conducted and accordingly we reject appellant's claim that the search was tainted by an illegal arrest.

[13] Appellant also argues that the search is illegal because of the "beeper" placed on his aircraft by a Customs agent. We find this contention to be without merit. Attempted use of the "beeper" is without significance in this case since it malfunctioned shortly after its installation and its use produced no evidence whatsoever. We are not called upon to decide the admissibility of evidence discovered by a "beeper", as in *United States v. Holmes,* 5 Cir. 1975, 521 F.2d 859, aff'd *en banc* 1976, 537 F.2d 227. Since the marijuana was not "come at by [the] exploitation of . . ." the electronic device, we need not be concerned with the legality of the installation of the "beeper". *See Wong Sun v. United States,* 1963, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, 455.

[14, 15] Appellant finally urges that the district court erred when it failed to conduct an *in camera* interview with the informer. We find that no such error was made, under the balancing test established in *Roviaro v. United States,* 1957, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639. Disclosure of an informer's identity is required only if necessary to a fair determination of an accused's guilt or innocence. "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62, 77 S.Ct. at 628-29, 1 L.Ed.2d at 646.

The circumstances in each case are determinative of the proper balance. *Id.* "The inquiry centers on the likelihood that the informant possesses facts which are relevant and helpful to the accused in preparing his defense on the merits." *United States v. Freund, supra,* 525 F.2d 873, 876.

[16] The evidence in the present case indicates that the informer played no part in the offense charged, and was not present at the time of arrest.[5] The Customs agents, through their own follow-up investigation and surveillance, came upon the marijuana which was plainly visible in appellant's possession in the aircraft. There is no basis here for even a bare supposition that the informer possessed facts either relevant or helpful to Worthington's defense.

We conclude that the facts found by the district court are amply supported by the evidence, that the legal conclusions drawn therefrom are sound, and that the judgment appealed from should be

AFFIRMED.

GOLDBERG, Circuit Judge (dissenting):

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5. Although we found an *in camera* interview to be appropriate in *United States v. Freund, supra,* the facts in the case at bar differ significantly from those in *Freund.* In that case, appellant Freund claimed that the stop was merely for a routine check and therefore the officer lacked probable cause to believe that his truck contained contraband. Freund relied on the DEA's written case summary, describing the stop as a routine check, to support his theory. Moreover, at the trial, it developed that the in former, who had not supplied any information in the case, was present at the search and arrest. *Id.* at 874-75. Because of these unusual circumstances, an *in camera* hearing was appropriate to determine if disclosure would be necessary to help Freund prepare his defense. *Id.* at 877-78. In the present case, there is no controversy regarding the agents' observations. Nor is it even claimed that the informer took part in the offense or was present at the time of arrest.

Where does a *Terry* stop stop and an arrest begin? This case calls for distinguishing between those seizures of the person sufficiently limited in their restriction of personal autonomy to permit the extraordinary measure of departing from the probable cause requirement of the fourth amendment and those seizures that must be predicated upon that traditional protective standard. Because I find that the dramatic accosting of appellant on the Victoria runway placed an unequivocal clamp on his liberty of movement from the initial moment of the confrontation, I would hold that obedience to fourth amendment jurisprudence, including the investigative stop doctrine, required antecedent probable cause. The majority has not asserted that probable cause existed prior to the confrontation; I have considered the facts and conclude that it did not. Therefore, I must respectfully dissent.

Accepting the majority's statement of the facts, I shall only recapitulate the circumstances of Worthington's apprehension that give rise to my disagreement on the law. Those circumstances begin with appellant landing his plane in bad weather at Victoria. The two Customs agents landed their plane seconds thereafter. They taxied to the point on the runway where Worthington had stopped, and they pulled the Customs plane directly in front of appellant's aircraft, cutting off his path of movement. Agent Williams disembarked and immediately trained an automatic rifle on appellant. As he did so, he saw the "brick outlines" in the burlap sacks behind Worthington. Though at the moment he disembarked Williams had intended only to investigate further to see whether an arrest might be in order, upon approaching the aircraft and seeing the "brick outlines" he told Worthington to raise his hands and informed him that he was under arrest. No more

than a single minute passed between the moment Williams disembarked and the moment he spoke the formal words of arrest.

As stated, I accept this sequence of events. The majority goes further and accepts the trial court's conclusion that, blockaded plane and pointed gun notwithstanding, the initial moment of confrontation constituted an investigative stop, permissible on reasonable suspicion of criminal activity under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny. I concur in the majority's assessment that circumstances prior to the confrontation had created the reasonable suspicion required under the investigative stop cases, and I agree that the "brick outlines" sighted during the confrontation gave rise to probable cause in the total complex of circumstances presented. I cannot, however, accept the characterization of that initial confrontation as an investigative stop. I simply cannot persuade myself that Worthington, completely stymied and faced with the barrel of a rifle held by an agent of the law, was under anything less onerous than an arrest. To put the matter bluntly, Worthington was not stopped, he was not frisked, he was simply arrested, before probable cause existed.

The elasticity of *Terry* is not boundless. The trail marked by *Terry* and its issue may be torturous and serpentine, but my understanding is that along its length and at its present juncture this principle remains vital: when a police-citizen confrontation is accompanied by a greater degree of force and restraint directed toward the citizen than is ordinarily or necessarily associated with a policeman's request to stop and answer some questions, it becomes the type of seizure that must rest on antecedent probable cause, whether or not it is within the traditional

definition of arrest. From that perspective, I conclude that the seizure here required the traditional probable cause basis.

I. SUPREME COURT APPROVAL OF SEIZURES UPON LESS THAN PROBABLE CAUSE: THE FRAMEWORK

In *United States v. Ramos-Zaragosa*, 516 F.2d 141, 144-45 (9th Cir. 1975), the Ninth Circuit addressed the taxing issue this panel now faces:

> The line between evidence seized pursuant to an unlawful arrest which must be suppressed * * * and evidence seized on the basis of probable cause which developed concurrently with a reasonably brief investigatory stop * * * is a difficult one to draw and follow.
>
> * * *
>
> We realize this state of affairs is not an entirely happy one for law enforcement officials. It is not surprising that such poorly marked boundaries are sometimes transgressed. Our task, however, is to preserve the markings as best we can. We cannot do this by pretending they do not exist.

Full consideration of this issue requires a brief return to those few Supreme Court decisions that have identified various police-citizen encounters as "seizures" within the fourth amendment yet validated them upon less than probable cause.

Chief among them is *Terry* itself. The state in that case argued that

> in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.

392 U.S. at 10, 88 S.Ct. at 1874. As the defendant urged, this argument sought a significant departure from traditional fourth amendment analysis, under which all official behavior intrusive or restraining enough to fall within the definitions of searches and seizures had to meet the standard of probable cause, determined, with narrow exceptions, by a neutral magistrate. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 358 (1974).

The Court appropriately recognized that a variety of modes of police-citizen confrontations not within the traditional confines of an arrest involved intrusion and coercion sufficient to require regulation by the fourth amendment. The Court rejected the notion that all those "seizures" would require probable cause, however, and indicated qualified approval of the argument for an "escalatory set of responses" subject to a general reasonableness test:

> In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.

392 U.S. 17, n. 15, 88 S.Ct. 1878.

Within this general framework, the Court recognized that departures from the probable cause requirement called

for extremely careful balancing of the government interests in support of a particular law enforcement measure against the intrusion upon individual privacy and freedom of movement. *Terry* itself presented the Court with a weapons pat-down of a citizen whom a patrolman wished to question on a public street. Without explaining what factors would indicate at the time of an apprehension that it was an arrest, the Court commented that an arrest's inevitable interference with future freedom of movement created a significantly greater restraint than the pat-down in question. The Court concluded that the interest in protecting the policeman from danger justified the carefully circumscribed weapons search.[1]

In short, *Terry* recognized that the extraordinary measure of departing from the probable cause requirement for certain "seizures" of the person short of arrest could be consistent with the fourth amendment. Each particular type of seizure, however, requires under *Terry* a careful weighing of governmental and individual interests. *Terry* neither diluted one whit the probable cause requirement for an arrest nor said that every seizure less oppressive than an arrest is permissible upon less than probable cause. The opinion simply set forth the balancing principle and found that it allowed for the limited, though significant, intrusion of a weapons pat-down in the situation presented.

On only two occasions since *Terry* has the Court found seizures valid on less than probable cause. In each, the

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1. Finding only that pat-down in issue, the majority in *Terry* declined to decide whether an investigative stop for brief questioning could itself be permitted without probable cause. *See Terry, supra*, 392 U.S. at 19, n.16, 88 S.Ct. 1868. Justice Harlan maintained in concurrence that the majority had implicitly approved such a stop. *See id.* at 32-33, 88 S.Ct. 1868.

Court again carefully focused on the limited nature of the intrusion as against the asserted government interests.

In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the Court explicitly recognized that a "stop", as well as a "frisk", could fall within *Terry*. Justice Rehnquist depicted the type of confrontation that might be authorized on less than probable cause:

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

407 U.S. at 146, 92 S.Ct. at 1923. *Adams* specifically approved only a patrolman's actions in walking toward a parked car and, after the suspect had rolled down the window as a response to the officer's request to get out of the car, reaching inside to check his waistband for a gun.

In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Court for the first time voiced approval of the stopping of a moving vehicle upon less than probable cause.[2] Faced with the strong government interest in control of illegal aliens, the Court recognized that a Border Patrol officer with a reasonable suspicion that a particular vehicle contains illegal aliens may stop the car briefly to question the occupants. The Court again focused on the limited nature of the intrusion—a detention normally lasting less than a minute,

2. Prior to this decision, a strong argument could be made that stopping a motorist involved sufficiently greater restraint than the measures approved in *Terry* and *Adams* to require probable cause. *See* Note, Nonarrest Automobile Stops: Unconstitutional Seizures of the Person, 25 Stan.L.Rev. 865 (1973).

visual inspection no greater than that available to anyone standing alongside a car, and questioning restricted to citizenship, immigration status, and particular suspicious circumstances.[3]

Brignoni-Ponce represents the extreme, in terms of interference with privacy and freedom of movement, to which the Court has taken the concept of nonarrest seizures that do not require probable cause. Arguably any seizure more intrusive or restraining must be predicated upon that traditional showing. At the least, any such seizure requires a return to the constitutional scales to determine what specificity of information the officer must possess before acting—probable cause, reasonable suspicion, or perhaps a category in between. *See Note, Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 Stan.L.Rev. 865, 879 (1973). With this framework in mind, I now turn to cases confronting more directly the problem of characterizing seizures similar to the apprehension of Worthington.

II. SEPARATING "PROBABLE CAUSE" AND "REASONABLE SUSPICION" SEIZURES

A. *The Battleground of Decisions*

Determining what police actions turn a particular encounter with a citizen into an arrest, *i.e.*, a seizure requiring probable cause,[4] has been a task undertaken only by the court of appeals. Several decisions at this level stand consistent with the proposition that police-citizen confrontations evidencing significantly greater force or

3. The Court did not discuss the manner of effecting a stop.

4. I shall for convenience label such a seizure as an arrest without suggesting that traditional definitions of that term determine the applicability of the probable cause standard.

restraint than the stops in *Terry*, *Adams*, and *Brignoni-Ponce* require probable cause.[5]

One preliminary observation, to which I do not understand the majority to object, must be made. The determination whether an arrest has occurred must rest on the objective facts of the particular incident. The subjective intent of the officer is in no way controlling; certain facts may give rise to an arrest despite an officer's lack of intent to arrest or his subsequent disclaimer. *See Taylor v. Arizona*, 471 F.2d 848 (9th Cir. 1972); *Cf. United States v. Tharpe*, 536 F.2d 1098 (5th Cir. 1976) (en banc).[6]

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5. In the cases discussed in Part I, *supra*, the Supreme Court did not have occasion to address the factors that would distinguish stops from arrests. Elsewhere the Court has offered only hints toward the resolution of various aspects of that inquiry.

In *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959), a pre-*Terry opinion*, the Court approved the government's concession that waving the defendant's car to a stop so restricted his liberty of movement that it completed an arrest. Because probable cause was lacking at that moment, subsequently discovered "fruits" had to be suppressed. If the general law enforcement interests recognized in *Terry* and *Adams* carry the same weight as the border control interests supporting the auto stop in *Brignoni-Ponce*, the holding in *Henry* has been significantly cut back. One commentator has suggested, however, that in any case the *Henry* analysis retains validity where the accosting is effected by "an unequivocal show of force." Cook, *Varieties of Detention and the Fourth Amendment*, 23 Ala.L.Rev. 287, 290 (1973).

The decision in *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), also eliminates one aspect of our line drawing task. There the Court held that briefly taking a suspect to the police station for the sole purpose of fingerprinting required probable cause. The position implies that intent to charge or prosecute is not an essential element of the category of seizures requiring probable cause. *See* Amsterdam, *supra*, at 453, n. 217.

6. Note the argument that in situations where an officer's objective assessment of circumstances would not justify his conduct under fourth amendment standards, then and only then should that subjective assessment control. *See United States v. Tharpe*, 5 Cir., 536 F.2d 1098, 1102 (Gee, J., dissenting); *id.* at 1103 (Goldberg, J., dissenting).

Consistent with that objective focus, *United States v. Strickler*, 490 F.2d 378 (9th Cir. 1974), should in my opinion be dispositive of this appeal. There a patrolman had received radio directions to "approach" a Cadillac. This coordinated response ensued: two squad cars pulled directly in front of and behind the Cadillac; a third drew alongside it, and the patrolman in the passenger seat pointed a gun at the suspects, ordering them to raise their hands.

Judge Hufstedler, writing for the court, emphatically rejected the suggestion that this encounter could be deemed an investigatory stop:

> we simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the "brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information" which was authorized in *Williams*.

490 F.2d at 380. Rather, the court concluded that this action completely restricted defendants' movements and constituted an arrest.

The only factual distinction between *Strickler* and the instant case lies in the finding that when Agent Williams pointed the rifle at appellant he had not yet ordered him to raise his hands.[7] Can it be seriously suggested that one

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7. By the time appellant was ordered to raise his hands, Agent Williams had seen the "brick outlines" that would have provided probable cause for an arrest. Characterization of the initial confrontation, however, must focus only on the moment when Williams, having blocked appellant's path of departure, trained his rifle on a man he concededly had no probable cause to arrest.

staring at the wrong end of an automatic rifle needs words of encouragement to realize the time has come to remain in place and strain his arms heavenward? I would not place controlling significance in the omission of so superfluous a command.[8]

A problem analogous to that before us arises when officers, with probable cause to arrest, engage in a search of a suspect. Courts have found it necessary to set the time of arrest in this context to determine if the search was "incident" to it. *But see Sibron v. New York,* 392 U.S. 40, 70, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (Harlan, J., concurring). Decisions in this context support the conclusion that apprehensions of the type presented in the instant case are arrests.

This court made such a decision in *United States v. Birdsong,* 446 F.2d 325 (5th Cir. 1971). We determine that the appellant's arrest had become complete when officers ordered him out of his parked car, surrounded him, and removed the keys from his car's ignition. The absence of formal words of arrest was not determinative.

Similarly, in *United States v. Lampkin,* 464 F.2d 1093 (3d Cir. 1972), the court found an arrest completed at the instant agents approached defendant on foot with guns drawn, halted him, and identified themselves. The circumstances showed an absolute restraint of the defendant that was abundantly clear to him.[9] *See also United States v.*

8. The Tenth Circuit has taken a similarly cautious view of the degree of seizures permissible on less than probable cause. In *United States v. McDevitt,* 508 F.2d 8 (10th Cir. 1974), the court observed that the stopping of a truck followed by a period of 15-20 minutes during which there was no evidence the defendant was free to leave constituted an arrest.

9. The court commented that the restraint evidenced an intent to arrest. I have stated above my understanding that subjective intent to arrest is not determinative.

See, 505 F.2d 845 (9th Cir. 1974) (arrest of defendants at service station complete when patrolman instructed them they were not "free to leave" and that they were to surrender their handguns).

Even courts that have found that particular encounters amounted to investigative stops rather than arrests have adhered to the principle that confrontations involving significantly greater restraint than those specifically approved by the Supreme Court require antecedent probable cause. Most significant in this regard is *United States v. Richards,* 500 F.2d 1025 (9th Cir. 1975), which offers a salutary delineation of one feature attending those seizures that have been upheld upon less than probable cause. The Court denominated the confrontation before it a "stop" because it

> was accompanied by no greater use of force than is involved in any request by a peace officer to stop and answer some questions.

500 F.2d at 1028.

The encounter in *Richards* began with one agent walking, gun holstered, to a suspect's plane preparing for takeoff. He requested the pilot to disembark and answer a few questions. Upon the pilot's refusal, another agent stepped in front of the plane and pointed a pistol at the pilot.

The court's application of the standard quoted to the facts before it raises serious questions from my perspective.[10] Even accepting the *Richards* conclusion for pur-

10. Judge Hufstedler, who wrote *Strickler, supra,* dissented in *Richards,* maintaining that the apprehension of the pilot was an arrest. The particular nature of the facts in *Richards,* as will be developed in the text *infra,* makes any choice between *Strickler* and *Richards* unnecessary for purposes of this opinion.

poses of argument, however, one significant feature distinguishes the situation there from that before this panel today. In *Richards* the initial confrontation was as noncoercive as possible. Only upon defendant's refusal to disembark did the second agent step in front of the plane with weapon drawn. That particular sequence assumes importance when considered against the evolution and nature of the investigative stop concept.[11]

Terry itself was a response to a plea for at least one additional tier of permissible police responses to developing situations in the streets. Law enforcement officials had claimed the necessity of *some* on-street investigative detention power that did not require probable cause. When a seizure is effected by more than the force that accompanies any request to stop and answer questions, especially if identical to the degree of force that would be used in effecting an arrest, the law enforcement aid *Terry* offered is perverted, and severe problems arise for judicial review. As stated above, subjective intent to take a person into custody does not control that review; neither do formal words of arrest. The plain view doctrine will eliminate the possibility of considering the length of detention where, as here, the officer effecting the purported "stop" instantaneously sees evidence creating probable cause and in-

11. There can be no suggestion that the relatively noncoercive approach to the plane found crucial to the finding of a mere "stop" in *Richards* is irrelevant to the present appeal because the agents here faced more dangerous circumstances. The indices of danger were at least as great in *Richards*. While the confrontation there did take place in the daylight, the agents had seen the suspect load a rifle scabbard onto the plane. No such concrete evidence of danger was in the hands of the officers here.

This observation is not meant to contradict the majority's observation that the agents reasonably concluded the circumstances were dangerous. Rather, it is to point out that those circumstances alone do not justify a finding that a confrontation involving this degree of coercion from the outset was an investigative stop.

staneously proceeds formally to arrest the suspect. In such circumstances, one can judge the nature of the confrontation only by its initial coerciveness.

These observations militate for adoption of a test along the line suggested in *Richards*. Probable cause is required to support seizures effected by force greater than that inherent in any request to stop for questioning.

This analysis could help explain decisions such as *Dell v. Louisiana*, 468 F.2d 324 (5th Cir. 1972). There an officer summoned a moving vehicle to the curb. When the defendant did not respond, the officer lifted his shotgun into the motorist's view, and the car pulled out. Without any discussion of the manner of effecting this seizure, we treated it as a stop permissible on "somewhat less" than probable cause.

That summary conclusion is not controlling here. In the first place, *Dell* involved solely the display of a gun, not a coordinated action designed to cut off all escape and confront the suspect with the threat of deadly force. In any case, the display of the gun in *Dell* did occur only after the suspect refused to follow the signal to pull to the curb. Therefore the initial moment of confrontation evidenced no greater coercion than that comprehended by any request to stop for questioning.

Finally, *United States v. Maslanka*, 501 F.2d 208 (5th Cir. 1974), relied on by the majority, is consistent with both the approach outlined above and a conclusion that the confrontation in the case before us went beyond a mere investigative stop. In *Maslanka* an officer chased a car whose occupants were suspected of involvement in drug transactions at speeds over 100 miles per hour for

several miles. When the car pulled over, the officer approached from behind with pistol drawn.

This court's treatment of that set of circumstances at most stands for the proposition, noted by the majority, that an armed approach to a stopped car is not by reason of the weapon alone an arrest. The unequivocal blockading of Worthington's path of movement, however, adds a significant dimension not raised by the simple presence of a gun. As was the case in *Strickler,* where Judge Hufstedler found the armed approach to a surrounded car to be an arrest, the degree of coercion here far exceeded that normally attendant, even in dangerous circumstances, upon a simple request to answer questions. The *Maslanka* panel recognized the distinction between the facts before it and those in *Strickler* and cited the latter with seeming approval.

Moreover, the panel explicitly offered its characterization of the confrontation as a stop as an alternative holding. The officer in *Maslanka* had probable cause to arrest for the high speed chase itself. The runway search before us lacks the alternative basis found to support the runaway search in *Maslanka.* To the extent any comments in that case, and I can find none, suggest any broad extension of the *Terry* rationale to coercive confrontations such as *Strickler,* I would decline to follow them.

B. *Synthesis*

The following analysis emerges from the Supreme Court discussion of police-citizen confrontations that justify departure from the probable cause requirement and court of appeals decisions considering the point at which a confrontation so restrains personal liberty that it must

rest on that traditional showing. The Supreme Court's careful weighing of the degree of intrusiveness occasioned by the nature of specific encounters, particularly in *Terry* and in *Brignoni-Ponce,* suggests that the degree of restraint and intrusion inherent in those "stops" may be the limit permissible upon less than probable cause. At a minimum the approach indicates that a seizure involving any greater coercion or intrusion requires a new assessment of the balance between individual liberty and governmental needs.[12]

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12. I would have the gravest doubts about any attempt to draw from the reasonableness balance additional categories of information requirements between probable cause and reasonable suspicion. Subsequent development of the "reasonable suspicion" standard has strongly vindicated Justice Douglas's dissenting warning of the departure from probable cause in *Terry;*

> Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime.

Terry, supra, 392 U.S. at 38, 88 S.Ct. at 1888. Any taxonomical amendments could only add to the confusion resulting from what is already a nigh unreal and unmanageable trinity of categories—probable cause, reasonable suspicion, and no cause. One commentator has offered cogent forewarning of the effect of proliferating categories into a general sliding scale to assess the reasonableness of various confrontation:

> What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.
>
> . . . In the real world of the streets and the trial courts, multiplication of gradations means the disappearance of the distinctions that are supposed to separate them.

Amsterdam, *supra,* at 394.

A reading of search and seizure cases is already a voyage into a storm of semantics. Further abdication to the semanticists would mean less protection of the individual, not more refined safeguards.

Characterizing the intrusiveness of a confrontation must proceed from its objective circumstances. Neither intent to charge with a crime nor formal words of arrest are prerequisites of a seizure that must be based on probable cause. On occasions when the immediate discovery of evidence at the confrontation directly brings about formal arrest, neither the duration of the alleged "investigative stop"[13] nor the act of taking into custody is available to aid in assessing the initial encounter. Analysis must therefore proceed from the degree of coerciveness demonstrated in that initial "seizure". At least where that initial confrontation is accompanied by a degree of coercion and restraint—as may be manifested by a threat of deadly force or the actual obstruction of avenues of escape—greater than that ordinarily or necessarily associated with a policeman's request to stop and answer questions. I would hold that the probable cause requirement must be satisfied.

III. APPLICATION

It remains but to apply this analysis to the facts at hand. How the agents could have made a more unequivocal demonstration of restraint in the few seconds that preceded the sighting of the "brick outlines" is difficult to imagine. The agents used their plane to block appellant's aircraft, cutting off his only path of movement. Agent Williams jumped out and immediately trained his Carbine on Worthington. The only further step he could have taken, a step he did take seconds later when the sighting

13. Where the index of duration is available, it has been suggested that, regardless of other circumstances, any detention that is more than "brief" must rest on probable cause. *See* Amsterdam, *supra*, at 453, n. 217; *cf. United States v. McDevitt*, 508 F.2d 8 (10th Cir. 1974).

of the "brick outline" had intervened, was explicitly to order Worthington to raise his hands. As stated above, I cannot regard that omission as determinative.

The concatenation of two dramatic acts—the blockading of the plane and the leveling of the rifle—takes this case far beyond an ordinary request to stop and answer questions, even a request directed to a moving vehicle. The sight of flashing red lights in the rear view mirror may be unwelcome and may bring on sinking sensations in the pit of the motorist's stomach. I cannot conceive that the intrusion compares to that which besets the individual target of the type of accosting involved here. I would consequently deem the seizure of Worthington an arrest. To do otherwise places a judicial imprimatur on ever increasing intrusions into individual privacy, in ever increasing derogation of the fourth amendment's protective promise to the citizens of our land.

The majority does not state that the agents had probable cause to arrest prior to the confrontation. I cannot conclude that the standard was met. Therefore I would reverse and require suppression of the marijuana discovered on the plane.[14]

Dissenting in *Terry*, Mr. Justice Douglas adverted to the

14. This result would visit no great burden on law enforcement officers attempting to deal with drug traffic. After *Terry*, many authorities suggested limiting the doctrine of investigative stops to crimes involving danger to persons or property. *See, e.g.*, American Law Institute, A Model Code of Pre-arraignment Procedure § 110.2 (1975). The ALI proposal was based on the observation of specialized narcotics agents that the investigative stop was not a particularly useful or common technique for dealing with drug offenses. The Supreme Court, however, appeared to decline the invitation to adopt this limitation in *Adams, supra*. *See* Note, The Supreme Court 1971 Term, 86 Harv.L.Rev. 1, 180 (1972).

> powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.

Terry, supra, 392 U.S. at 39, 88 S.Ct. at 1889. Time has borne out his warning of the frailty of the protection offered against arbitrary police action by the "reasonable suspicion" test. Mr. Justice Marshall recanted his concurrence in *Terry* and wrote in dissent in *Adams:*

> It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result of today's decision, the balance struck in *Terry* is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police action involved herein, is dealt a serious blow.

Adams, supra, 407 U.S. at 162, 92 S.Ct. at 1931.

I believe we face those same hydraulic forces again today. That the flood we must deal with may seem small attests only to the dimensions of past deluges; it does not justify acquiescence in another. I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1586

D. C. Docket No. CR-74-V-2
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES LEE WORTHINGTON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, SIMPSON and GEE, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 10, 1977

GOLDBERG, Circuit Judge, dissenting.
Issued as Mandate: February 24, 1977

A True Copy

Attest:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit

/s/ By Mary Beth Breaux
Deputy

New Orleans, Louisiana
February 24, 1977

"EXHIBIT C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

February 16, 1977

TO ALL COUNSEL OF RECORD

NO. 76-1586

USA v. James Lee Worthington

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Fule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ By Susan M. Gravas
Deputy Clerk

/smg/

cc: Mr. C. Anthony Friloux, Jr.
Ms. Mary L. Sinderson